No. 9813.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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Opinion Below.

The opinion of the District Court of the United States for the Southern District of California, Central Division [R. 45 to 47] is unreported.

Jurisdiction.

These appeals involve Federal income tax for the years 1923 and 1924 and were taken from judgments of the District Court of the United States for the Southern District of California, Central Division, entered December 26, 1940. [R. 61 to 63.] The notices of appeal were filed March 20, 1941 [R. 64 to 65] pursuant to provisions of Section 128 of the Judicial Code. The District Court took jurisdiction under the provisions of Section 24 (1) of the Judicial Code. [R. 2.]

There were two separate proceedings below which were consolidated for trial [R. 42] and which have been con-

solidated for purposes of this appeal. [R. 65.] One proceeding, Case No. 1460-Y, involved a suit by the appellee against the appellant in equity under the trust fund theory for the 1923 and 1924 Federal income tax of Signal Gasoline Company [R. 2 to 9], while the other involved a suit in equity by the appellee against the appellant under the trust fund theory for Federal income taxes for the year 1924 of Signal Gasoline Corporation. [R. 9 to 15.]

The appellant, Signal Oil and Gas Company, is a corporation organized under the laws of the State of Delaware, and has its principal place of business at Los Angeles, California.

Questions Presented.

1. Whether any taxes were due from the Signal Gasoline Company or Signal Gasoline Corporation, the only evidence thereof being purported assessments made in the name of Signal Gasoline Corporation years after it had been dissolved and, by virtue of California law, completely destroyed.

2. Assuming without conceding that the said alleged assessments were valid, were the suits against appellant barred by the statute of limitations where appellant in each case was the transferee of a transferee of the corporation whose taxes are alleged to be due?

3. If the suits are *prima facie* barred by the statute of limitations, is appellant estopped from asserting the bar of the statute of limitations where the appellee had all the facts and simply made errors of law?

Statutes Involved.

The statutes involved are set out in the appendix.

Statement.

The pertinent facts are set out in the record [pp. 72 to 83 incl.] and the exhibits set out in the record [pp. 83 to 100 incl.]. The facts in Case No. 1460-Y may be briefly stated as follows:

On May 1, 1924, Signal Gasoline Company transferred all its assets to Signal Gasoline Corporation in exchange for the assumption of outstanding liabilities not exceeding $51,076.80 including all income taxes that might be due the Government as of the date of the assignment, plus 400,000 shares of the stock of Signal Gasoline Corporation. On September 11, 1924, Signal Gasoline Company was dissolved and distributed its assets, being the 400,000 shares of stock of Signal Gasoline Corporation, to its stockholders. [R. 72 to 73.]

The appellant, Signal Oil and Gas Company, was organized under the laws of the State of Delaware in 1928 and by November 30, 1928, had acquired 100% of the stock of Signal Gasoline Corporation in exchange for its own stock. [R. 73.]

Signal Gasoline Corporation was liquidated as of December 1st, 1928, and all its assets and liabilities were assigned in accordance with a certain instrument of conveyance and the Decree of Dissolution of the Superior Court. [R. 74.] The Decree of Dissolution set forth that S. B. Mosher, O. W. March, Ross McCollum, H. M. Mosher, C. Lav. Larzalere and R. H. Green were the members of the Board of Directors of the Signal Gasoline Corporation. They were appointed by the Court as trustees for the stockholders and creditors of the corporation, with power and direction to settle all the affairs of the corporation and to distribute

and convey all the property of said corporation to each of said stockholders in proportion to the number of shares owned and held by said stockholders when said distribution and conveyance was made. [Plaintiff's Exhibit 2; R. 87-88.] On December 14, 1928, the said trustees of Signal Gasoline Corporation executed a notice re conveyance of assets which recited the court decree and the appointment of the statutory trustees, and which recited that the Signal Oil and Gas Company was the owner of all the outstanding stock of Signal Gasoline Corporation and was entitled to the distribution of all the assets of that company. Said notice did assign to the Signal Oil and Gas Company all the assets of the Signal Gasoline Corporation subject to all the outstanding liabilities and to the payment of income taxes that might be due to the Government covering operations of the dissolved corporation during the current year, and all sums that might be found due covering income taxes for previous years. [Plaintiff's Exhibit 2; R. 83-84.]

The original income tax return for 1923 of Signal Gasoline Company was filed on behalf of that company on March 15, 1924, and an amended return for that year was filed May 13, 1925. A tentative return for 1924 was filed March 16, 1925, and the final return for 1924 was filed May 13, 1925. [R. 74.]

On October 2, 1928, and again on December 28, 1929, the Commissioner of Internal Revenue addressed and mailed a letter to the Signal Gasoline Corporation setting

forth certain transferee deficiencies; the letter of October 2, 1928, claiming a deficiency of $468.33 for 1923 to be due from Signal Gasoline Corporation as transferee of the assets of Signal Gasoline Company; the letter of December 28, 1929, claiming a deficiency of $2672.53 for the period ended December 11, 1924, to be due from Signal Gasoline Corporation as transferee of the assets of Signal Gasoline Company. [R. 74.]

On November 19, 1928, Signal Gasoline Corporation filed with the United States Board of Tax Appeals an appeal from the deficiency proposed in the letter of October 2, 1928. This petition was docketed with the Board under No. 41532. [R. 75.]

On February 24, 1930, a petition was filed in the name of Signal Gasoline Corporation, appealing from the deficiency proposed in the letter of December 28, 1929. This petition was docketed with the United States Board of Tax Appeals under No. 47620. This petition, in its first paragraph stated that: "The petitioner is a dissolved corporation acting through its statutory trustees * * *". The verification of the petition was signed by the six persons who had been appointed by the Court as statutory trustees of Signal Gasoline Corporation, and the verification stated that these six persons were "* * * the statutory trustees of Signal Gasoline Corporation, a dissolved corporation * * *". [R. 75.]

Both of the petitions mentioned above were signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioners. [R. 75.]

These matters were pending before the Board of Tax Appeals from November 19, 1928, and February 24, 1930, respectively, until February 16, 1932. [R. 75.] No substitution of parties was ever made and no motion of such substitution was ever made by either of the parties though the Commissioner of Internal Revenue was informed of the dissolution of Signal Gasoline Corporation in December of 1928 as follows [R. 79]:

1. On May 13, 1929, a corporation income tax return for 1928 was filed with the Collector of Internal Revenue at Los Angeles, California, on behalf of the Signal Gasoline Corporation. In said return it was stated in affiliation schedule No. 3 thereof, that the Signal Gasoline Corporation had been dissolved in December of 1928. The return was signed by S. B. Mosher as president, and O. W. March as treasurer. [R. 82.]

2. On November 20, 1929, a power of attorney was executed whereby certain attorneys were authorized to represent Signal Gasoline Corporation, a dissolved corporation, before the Treasury Department in connection with the tax liabilities of said corporation for the calendar years 1926 and 1927. Said power of attorney stated that the Signal Gasoline Corporation was a dissolved California corporation acting through its statutory trustees. It was signed by Signal Gasoline Corporation, by S. B. Mosher and five other persons, and the verification stated that the persons who had signed it were the statutory trustees of the above named dissolved corporation. [Plaintiff's Exhibit 7; R. 95-96.]

3. On February 24, 1930, the petition to the Board of Tax Appeals was filed as indicated above, stating that Sig-

nal Gasoline Corporation was a dissolved corporation acting through its statutory trustees, and the verification was signed by six persons who stated that they were the statutory trustees of Signal Gasoline Corporation, a dissolved corporation. [R. 75.]

4. In a Revenue Agent's report dated August 26, 1930, it was stated that Signal Gasoline Corporation had distributed all its assets to its sole stockholder, Signal Oil and Gas Company, upon its dissolution in December of 1928. [R. 82.]

5. In a letter dated March 30, 1931, from the Commissioner of Internal Revenue, addressed to the Signal Gasoline Corporation, which letter was a 60-day letter proposing additional taxes for the year 1928, it was stated that the Signal Gasoline Corporation had been dissolved in December, 1928. [R. 82-83.]

6. Except for the matters set out above, no other correspondence with the Collector of Internal Revenue was filed by and on behalf of Signal Gasoline Company or Signal Gasoline Corporation after their dissolution and prior to February 16, 1932, excepting as follows:

(a) On January 20, 1932, a letter to the Commissioner was written and signed "Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller" advising the Commissioner to change his records so that all correspondence relative to the income tax matters of Signal Gasoline Corporation for 1924 to 1928 inclusive would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California. [R. 81.]

(b) On January 20, 1932, a similar letter was written signed "Signal Gasoline Company, by J. H. Rounsavell,

Comptroller" with respect to the Signal Gasoline Company for 1922 to 1924. [R. 81.]

(c) On January 20, 1932, a similar letter was written and signed by Signal Gasoline Company, Inc., by J. H. Rounsavell, Comptroller, with respect to the 1925, 1926, 1927 and 1928 taxes of the Signal Gasoline Company, Inc. [R. 81.]

(d) On July 27, 1931, a letter signed by Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller, was mailed to the Collector at Los Angeles, stating that there was pending before the Board of Tax Appeals the question of whether Signal Gasoline Corporation was liable for the 1923 income tax liability of Signal Gasoline Company. [R. 81-82.]

On February 16, 1932, the Board of Tax Appeals purported to affirm the rulings of the Commissioner of Internal Revenue in asserting the deficiencies appealed from in petitions numbered 41532 and 47620, relating to the income taxes of the Signal Gasoline Company. Said decision of the Board is contained in an opinion reported in 25 B. T. A. 532. [R. 75.]

On September 10, 1932, the Commissioner purported to assess the Signal Gasoline Corporation as a transferee of the Signal Gasoline Company for the above described tax liabilities of Signal Gasoline Company in the amounts and for the taxable periods as follows:

For the taxable year 1923, $468.33 plus interest of $227.96; for the taxable period ended September 11, 1924, $2672.53 plus interest of $1,200.70. [R. 76; Plaintiff's Exhibit J; R. 88-89.]

By reason of the dissolution of the Signal Gasoline Corporation and the disbursement of all its assets to its statutory trustees as above set forth, Signal Gasoline Corporation was and is left without any money, assets or property of any kind, with which to pay said taxes and interest claimed herein by the United States. The assets which were acquired by the appellant, Signal Oil and Gas Company, as sole stockholder of Signal Gasoline Corporation as heretofore shown were far in excess of the taxes and interest prayed for in the complaint herein. [R. 79.]

Due demand for the payment of taxes and interest prayed for in the complaint herein has been made upon the Signal Oil and Gas Company but no portion thereof has been paid. [R. 79.]

At all times herein mentioned and considered, substantially the same persons were officers and directors or statutory trustees of the Signal Gasoline Corporation, as were the officers and directors of the Signal Oil and Gas Company and officers and directors or trustees of the Signal Gasoline Company. [R. 79.]

An offer to compromise the taxes here involved, acknowledged October 31st, 1932, was filed shortly thereafter. It was signed by the Signal Gasoline Corporation, by S. B. Mosher, H. M. Mosher, O. W. March, R. H. Green, and C. Lav. Lazalere. The acknowledgment stated that the above named persons were the statutory trustees of Signal Gasoline Corporation, a dissolved corporation. In the body of the offer it was stated that Signal Gasoline Corporation was dissolved December 12, 1928. [R. 80.]

A similar offer, acknowledged January 23, 1933, and filed shortly thereafter, stated that Signal Gasoline Corporation was dissolved December 12, 1928. It was signed by the Signal Gasoline Corporation, by Melvin D. Wilson, Attorney-in-Fact. In the acknowledgment it was stated that Signal Gasoline Corporation was a dissolved corporation. [R. 80.]

No assessment was ever made against Signal Oil and Gas Company for 1923 and 1924 tax liabilities of the Signal Gasoline Company. No assessment was ever made against the Signal Gasoline Company for the said 1924 tax liability of Signal Gasoline Company. A purported assessment against the Signal Gasoline Company was made July 3, 1931, in the amount of $468.33 plus interest for its said tax liability for the calendar year 1923. [R. 82.]

The appellee brought its suit against appellant on September 9, 1938, at the direction of the Attorney General, with the sanction and at the request of the Commissioner of Internal Revenue. [R. 2, 3.]

This case, Docket No. 1460-Y, was tried before the Honorable Leon R. Yankwich on January 16, 1940, upon a written stipulation of facts and upon documentary evidence being introduced into evidence. [R. 33-41.]

On July 27, 1940, the Judge of the District Court filed his minute order finding for the appellee. [R. 45-46.] The findings of fact and conclusions of law was signed by the District Judge on December 26, 1940, and filed the same day. [R. 48-61.] Judgment in favor of the appellee in the amount of $4,569.52 together with interest at the rate of 12% per annum from September 10th, 1932, to October 24, 1933, and interest at the rate of 6% per annum from October 24, 1933, to date of pay-

ment, together with costs in the sum of $27.14, was signed and entered on the 26th day of December, 1940. [R. 61-63.]

The facts in case No. 1461-Y may be briefly stated as follows:

All the facts stated above with respect to case No. 1460-Y relative to the dissolution of Signal Gasoline Corporation, the distribution of its assets to the statutory trustees, the conveyance by the statutory trustees of the assets to appellant, the various notices given to the Commissioner by the statutory trustees that Signal Gasoline Corporation had been dissolved, the fact that the dissolution of Signal Gasoline Corporation left it unable to pay any tax liabilities, and any other statements made above which are pertinent to this case, are incorporated herein as fully as though herein set forth at this point.

Signal Gasoline Corporation filed its income tax return for the calendar year 1924 on or about May 13, 1925. [R. 76.]

On December 3, 1928, Signal Gasoline Corporation signed and filed Form 852 which is entitled "Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax"; that document purported to give the Commissioner until December 31, 1929, in which to assess additional income taxes for 1924 against Signal Gasoline Corporation. [Plaintiff's Exhibit 4; R. 91-76.]

On December 12, 1928, the Signal Gasoline Corporation was dissolved as stated heretofore.

On December 28, 1929, the Commissioner of Internal Revenue addressed and mailed a letter to Signal Gasoline Corporation. This letter proposed an assessment of ad-

ditional tax liability against the Signal Gasoline Corporation for the period May 1st to December 31st, 1924, in the amount of $14,137.05. [R. 76.]

On February 24, 1930, a petition was filed with the Board of Tax Appeals for a redetermination of the 1924 deficiency proposed in the Commissioner's letter dated December 28, 1929, above referred to; that said proceeding was therein given Docket No. 47621; that said petition was filed under the name of Signal Gasoline Corporation; that the petition stated in its first paragraph that: "The petitioner is a dissolved California corporation acting through its statutory trustees * * *"; that the verification of the petition was signed by six persons and the verification stated that these six persons were "* * * the statutory trustees of Signal Gasoline Corporation, a dissolved corporation * * *"; the petition was signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioner. [R. 77-78.]

Although the Commissioner of Internal Revenue had the various notices given him by the statutory trustees that Signal Gasoline Corporation had been dissolved December in 1928, he made no motion for substitution of the parties during the time the case was pending before the Board of Tax Appeals. [R. 79.]

On March 15, 1932, the Board of Tax Appeals purported to affirm the ruling of the Commissioner of Internal Revenue in asserting the deficiency appealed from in Docket No. 47621. Said decision of the Board is contained in an opinion reported in 25 B. T. A. 861. [R. 78.]

On October 1, 1932, the Commissioner of Internal Revenue purported to assess the Signal Gasoline Corpo-

ration for its tax deficiency for the calendar year 1924 in the principal amount of $14,137.05 plus interest of $6,080.77. [R. 78; Plaintiff's Exhibit 9; R. 97-98.]

Due demand for the payment of the taxes and interest prayed for in this case has been made upon appellant, but no portion thereof has been paid. [R. 79.]

No assessment was ever made against Signal Oil and Gas Company for the tax liability of Signal Gasoline Corporation for the year 1924. [R. 82.]

The appellee brought its suit against appellant on *September 9, 1938,* at the direction of the Attorney General. with the sanction and at the request of the Commissioner of Internal Revenue. [R. 9-16.]

This case, Docket No. 1461-Y, was tried before the Honorable Leon R. Yankwich on January 16, 1940, upon a written stipulation of facts and upon documentary evidence being introduced into evidence. [R. 33-41.]

On July 27, 1940, the Judge of the District Court filed its minute order finding for the appellee. [R. 46-47.] The findings of fact and conclusions of law was signed by the District Judge on December 26, 1940, and filed the same day. [R. 48-61.] Judgment in favor of the appellee in the amount of $20,217.82 together with interest at the rate of 12% per annum from October 1, 1932, to October 24, 1933, and interest at the rate of 6% per annum from October 24, 1933, to the date of payment, and costs in the amount of $27.06.

Specification of Errors Relied Upon.

1. There was no evidence introduced at the trial showing that the taxes sued on were due from anyone. The alleged assessments relied on by the appellee for that purpose were void and prove nothing, having been purportedly made long after the corporation against which they were supposed to have been made had been dissolved and utterly destroyed by its dissolution. Said alleged assessments were based upon alleged proceedings in the Board of Tax Appeals wherein the appellee was guilty of laches in that it did not move for a dismissal or substitution of the petitioner although long having knowledge that the petitioner had been dissolved and destroyed by its dissolution.

2. The suits by appellee were barred by the statute of limitations as they were not brought within four years of the filing of the returns of the corporations whose taxes were involved and no assessment was made against the appellant, but the appellee was relying upon a six-year period within which to sue appellant after alleged assessments against a prior transferee, but the alleged assessments against the prior transferee were invalid for the reason stated in Point 1, and hence do not give a six year period for suit, and even if the assessments against the prior transferee had been valid, they would not give appellee six years within which to sue subsequent transferees.

3. Appellant is not estopped from asserting the bar of the statute of limitations, appellee having at all times been

in possession of all the material facts and having initially made an error of law which error misled the appellant's predecessors into further errors of law, if they made any errors of law, but estoppel does not arise from errors or mutual errors of law.

4. The judgments against appellant should be reversed. [R. 101-103.]

Summary of Argument.

The specification of errors relied upon also constitutes a brief summary of the argument.

ARGUMENT.

1. No Evidence Was Introduced at the Trial Proving That the Taxes Sued Upon Were Due From Anyone. The Alleged Assessments Relied Upon by the Appellee for That Purpose Being Void.

The appellee brought suits in equity against appellant to collect from appellant taxes alleged to be owing from other corporations now dissolved.

Appellee, of course, *has* the burden of proving all the material allegations of its complaints. The appellee, in its complaint, did not even allege that the taxes were due from anyone.

Appellee did allege that assessments had been made against Signal Gasoline Corporation and appellee relied on those assessments as proving that the taxes were due. As will be hereinafter shown, the alleged assessments against Signal Gasoline Corporation were void and raise no presumption that the taxes sought to be recovered herein were due from Signal Gasoline Company, Signal Gasoline Corporation, Signal Oil and Gas Company, or from anyone else.

As shown in the statement of facts, Signal Gasoline Corporation was dissolved in December of 1928. The alleged assessments relied on by the appellee were not made until September 10, 1932, and October 1st, 1932, respectively. [R. 75-78.]

Thus the alleged assessments were made nearly four years after Signal Gasoline Corporation had been dissolved. Said alleged assessments were absolutely void and of no effect whatsoever.

In December of 1928, when Signal Gasoline Corporation was dissolved, Section 400 of the Civil Code of the

State of California read as shown in the appendix to this brief. It will be noted that under such section the last directors ordinarily became the statutory trustees for the creditors and stockholders and had full power to settle any of the affairs of the corporation, collect and pay outstanding debts, sell the assets, and distribute the proceeds to the stockholders. It will be noted that no provision was made for the extension of the corporate existence whatsoever.

Under this provision of the Civil Code, the dissolution of the corporation absolutely destroyed it. In Ballentine on California Corporations, 1931 Edition, P. 476, this proposition is set forth as follows:

> "Corporations dissolved prior to August 14, 1929, are not governed by Section 399, Civil Code, and their corporate existence came to an end under the former Code provision. When a corporation was dissolved, the persons constituting the last Board of Directors became the statutory trustees *ex officio* of the defunct corporation and were charged with the duty of winding up its affairs, even though the technical legal title may have vested in the shareholders. Pending actions against the corporation abated and the directors, as trustees, had to be substituted. As to such corporation, the effect of dissolution was to terminate the legal entity and render the corporation incapable of acting, or of suing, or being sued."

The above quotation is based upon the California Supreme Court cases of *Crossman v. Vivienda Water Company,* 150 Cal. 575, 89 Pac. 335, and *Brandon v. Umqua Lumber Company,* 166 Cal. 322, 136 Pac. 62, 47 A. L. R. 1407. See also 7 *Cal. Jur.* 137-138.

In *7 Cal. Jur.* 138, the following statement appears:

> "A dissolved corporation is incapable of suing or being sued as a corporate body or in its corporate name, there being no one who can appear and act for the corporation, all actions pending against it are abated, and any judgment attempted to be given against it is void—a mere nullity, except as otherwise as provided by statute. Such a void judgment, therefore, is no bar to a subsequent action against the trustees of the corporation."

The above principle of law has been recognized by the United States Circuit Court of Appeals for the Ninth Circuit in *G. M. Standifer Construction Corporation v. Commissioner,* 78 Fed. (2d) 285. In that case an Oregon corporation had dissolved on August 30, 1927, and under the laws of Oregon it continued to exist for five years for the purpose of winding up its affairs. On November 1, 1930, the Commissioner of Internal Revenue sent it a 60-day letter notifying it of a deficiency in its 1928 income tax. On December 29, 1930, the corporation filed with the Board of Tax Appeals a petition for redetermination. On October 2, 1933, after the expiration of the five-year period, the matter was heard by the Board and on June 7, 1934, the Board rendered its decision, to review which a petition was filed in the United States Circuit Court of Appeals for the Ninth Circuit, on October 29, 1934. The Circuit Court, at 78 Fed. (2d), page 286, said:

> "The general effect of the dissolution of a corporation is to put an end to its corporate existence for all purposes whatsoever, and to extinguish its power to sue or be sued, but, if the law of the state of incorporation so provides, its existence may continue for a specified period after dissolution for the pur-

pose of winding up its affairs, and during that extended period of corporate life, it may sue or be sued. Thompson on Corporations, Third Edition, Vol. 8, Secs. 6505, 6530; 14a C. J. 1200, 1201; 7 R. C. L. 735, 743. The rule is stated as follows in Oklahoma Natural Gas Company v. State of Oklahoma, 273 U. S. 257, 259, 47 Sup. Ct. 391, 392, 71 L. Ed. 634:

"'It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect. (Citing cases.) It follows therefore that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes, it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.'"

This Court, in the *Standifer* case, at page 286, then said:

"Here, the five-year period expired, the corporation became defunct, and the proceeding before the Board of Tax Appeals abated on August 30, 1932, twenty-one months before the Board rendered its decision.

> The petition filed in this court in the name of the defunct corporation presented nothing for review. The only thing we can do with such a petition is to dismiss it."

In that case, the proposed deficiency against the defunct corporation of course became abated and a nullity and it was incumbent upon the Commissioner to proceed against the transferees of the assets of the corporation subject to all the defenses they might raise.

In other tax cases, the principle has also been recognized that a corporation whose legal existence has been completely terminated cannot have a valid assessment, order, or judgment made against it. (*Sanborn Brothers, Successors, etc.,* 14 B. T. A. 1059; *Union Plate and Wire Company,* 17 B. T. A. 1229; *Iberville Wholesale Grocery Company,* 15 B. T. A. 645 and 17 B. T. A. 235; *S. Hirsch Distilling Company,* 14 B. T. A. 1073.)

In the case of *S. Hirsch Distilling Company, supra,* decided January 9, 1929, a Missouri corporation was involved. The statutes of Missouri were like the statutes of California in effect at the time Signal Gasoline Corporation was dissolved. There was no provision for continuing the corporate existence for any purpose, but the last directors were the statutory trustees for the creditors and stockholders. The Board, in discussing the effect of this dissolution of the Missouri corporation, said:

> "In Scanlan v. Crawshaw, 5 Mo. App. 337, it was held that a judgment against the corporation that had ceased to exist at the time it was rendered was a nullity and that an order to issue execution on such judgment against the stockholder was void."

The Board concluded that the S. Hirsch Distilling Company ceased to exist at the time of its dissolution, namely, June 20, 1920, and that all the rights which it, as a corporation, had theretofore had were completely extinguished; that it no longer had any right to do anything and no legal existence or status to institute the proceeding before the Board (in 1926), and the Board's determination of the deficiency under such circumstances would be a nullity, and accordingly, the Board, on its own motion, held that it had no jurisdiction.

As noted above, under California law, a judgment attempted against a corporation dissolved prior to July 14, 1929, is void and a mere nullity. (*7 Cal. Jur.* 138; *California National Supply Company v. Flack,* 183 Cal. 124, 190 Pac. 634; *Hanson v. Choynski,* 180 Cal. 275, 180 Pac. 816; *Llewellyn Iron Works v. Abbott Kinney Co.,* 172 Cal. 210, 155 Pac. 986; *Newhall v. Western Zinc Mining Co.,* 164 Cal. 380, 128 Pac. 1040; *Crossman v. Vivienda Water Company,* 150 Cal. 575, 89 Pac. 335.)

It seems clear therefore that the alleged assessments against Signal Gasoline Corporation in 1932 were an absolute nullity as the corporation had been destroyed by its dissolution in 1928. Consequently, the void assessments do not prove that the alleged tax was due. The taxes involved were never assessed against appellant Signal Oil and Gas Company.

Since there is no evidence that the tax was due from anyone, the appellee cannot collect the said alleged tax from anyone.

2. **The Alleged Assessments Being Void Do Not Start a Six-Year Period in Which the Appellee Could Sue Transferees.**

The alleged taxes involved in these proceedings related to the years 1923 and 1924 for which returns were filed in 1924 and 1925. The statutory time for bringing suit against the taxpaying corporation or anyone else based on the returns was four years after the returns were filed. (Section 277 (a) (1) of the Revenue Act of 1924.) It is obvious, therefore, that the appellee was not suing the appellant under that section as the suits were not brought until 1938.

No assessment has been made against Signal Oil and Gas Company (for the alleged taxes of its predecessors) and hence the appellee could not have been relying upon Section 278 (d) of the Revenue Act of 1926 which gave the Commissioner six years after an assessment within which to collect tax from the entity assessed.

The appellee was relying upon a six-year period for bringing suit against transferees, under the trust fund theory, based upon alleged assessments against the Signal Gasoline Corporation. (Section 278 (d) of the Revenue Act of 1926.) In other words, the appellee relied upon assessments made in September and October of 1932 and brought the suits just within six years from the date of said purported assessments.

The assessments on which the appellee relied for starting the six-year period for bringing suit were, as shown

above, absolutely void. Consequently, they did not give the Government six years within which to sue anyone. No argument or citation of authority is necessary to support the proposition that legal rights cannot be based upon a nullity.

The alleged assessments on which the appellee was relying to commence the six-year period of limitation for bringing suit being void, the appellee is relegated to the provisions of law which give it four years after the returns for 1923 and 1924 were filed within which to sue alleged transferee. Since the returns were filed in 1924 and 1925, the time for filing suit expired in the spring of 1928 and 1929. The suits having been brought in 1938 are barred by the statute of limitations.

On May 13, 1929, on November 20, 1929, and on February 24, 1930, the Commissioner was advised that Signal Gasoline Corporation had been dissolved. Under Section 280 (b) (1) of the Revenue Act of 1926, appellee had until March 15, 1930, within which to assess the trustees of Signal Gasoline Corporation or the Signal Oil and Gas Company, as the transferee. The appellee's failure to do so was due to its erroneous interpretation of the California law respecting dissolved corporations and not to any fault of the trustees or appellant. The present proceedings are barred by the statute of limitations.

3. If, Contrary to Appellant's Contention, the Alleged Assessments Are Held to Be Valid, They Were Made Against the First Transferees of the Taxpaying Corporations and Said Assessments Did Not Give the Appellee Six Years in Which to Sue Subsequent Transferees.

In Case No. 1460-Y, the facts clearly show that the taxes involved were the 1923 and 1924 taxes of Signal Gasoline Company; that this company dissolved, distributed its assets to Signal Gasoline Corporation; that Signal Gasoline Corporation dissolved and its assets eventually, after passing through its statutory trustees, came over to appellant, Signal Oil and Gas Company.

It is obvious, therefore, that Signal Oil and Gas Company is a transferee of the transferee of the assets of Signal Gasoline Company, the taxpaying corporation.

The Government is relying on a six-year period based upon an assessment made upon the first transferee to sue the second transferee. But the Supreme Court, in *United States v. Continental National Bank and Trust Company,* 305 U. S. 398, very clearly and definitely held that a timely assessment against the first transferee of the assets of the taxpayer did not give the Government six years in which to sue the second transferee of the assets of the taxpayer.

That case is, therefore, squarely in point and directly bars the action in the case of 1460-Y.

The important facts in the two cases are very similar and are as follows:

Description	Continental Case	Case 1460-Y
Taxable years involved:	1920,	1923, 1924
Character of original taxpayer:	Corporation	Corporation
Relation of Appellant to original taxpayer:	Transferee of a Transferee	T. of a T.
Did first transferee file a petition with the Board of Tax Appeals:	Yes	Yes
Was an alleged assessment made against the first transferee? Date	Yes-2-14-31	Yes-9-10-32
Was suit brought against second transferee without assessment against the defendant? Date	Yes-5- 6-32	Yes-9- 9-38
Period between filing of return of original taxpayer and bringing of suit in years	11	13-14
Period between assessment on first transferee and suit against second transferee in years	1¾	6

It is well established, therefore, that even if the assessment against Signal Gasoline Corporation for the taxes alleged to be due from Signal Gasoline Company for the years 1923 and 1924 was valid, that assessment, being on the first transferee, did not give the Government six

years in which to sue the second transferee, namely, appellant.

At the time appellee brought its suit, an assessment against the first transferee was thought to give the Government six years in which to sue subsequent transferees. The appellee doubtless relied on this misapprehension of the law, as it waited five years, eleven months and twenty-nine days before bringing suit. If appellee had not made that mistake of law, it might have taken some other timely action. But appellee did make that mistake of law, and is now casting about, trying to fasten the blame on appellant, by pleading estoppel.

As to the facts in Case No. 1460-Y, therefore, it is clear that the Supreme Court's decision in *U. S. v. Continental Nat. Bk. & Tr. Co.,* is squarely in point, and bars the suit.

In Case No. 1461-Y, the Supreme Court's decision in *U. S. v. Continental Bank and Trust Company* also bars the complaint but the facts do not stand out quite so clearly.

In this case the tax involved was the 1924 tax of Signal Gasoline Corporation. That corporation was dissolved in December of 1928 but the Commissioner of Internal Revenue purported to make an assessment against Signal Gasoline Corporation in October of 1932.

The appellee thought that it had six years from the alleged assessment in October of 1932 against Signal Gasoline Corporation to sue appellant.

Now it is not entirely clear as a matter of law whether the alleged assessment made in October, 1932, was purportedly made against Signal Gasoline Corporation or

against the statutory trustees of Signal Gasoline Corporation.

If the alleged assessment was purportedly made against Signal Gasoline Corporation, then said alleged assessment was void, as Signal Gasoline Corporation had been destroyed in 1928 on its dissolution, and the void assessment would not start a six-year period of limitations within which the Government could sue the transferees and this suit would be barred.

If the appellee contends that the assessment was really against the statutory trustees of the dissolved Signal Gasoline Corporation, then appellant contends that the suit is barred because the statutory trustees were the first transferees of Signal Gasoline Corporation, and an assessment against them as first transferees does not give the Government six years within which to sue appellant who was the second transferee of Signal Gasoline Corporation. (*U. S. v. Continental National Bank and Trust Company*, 305 U. S. 398.)

Appellant suggests that the alleged assessment made in October, 1932, in the name of Signal Gasoline Corporation was really made against the statutory trustees. Section 400 of the Civil Code of California as it stood in 1928 when Signal Gasoline Corporation was dissolved, provided in part as follows:

> "* * * Such trustees shall have authority to sue for and recover the debts and property of the corporation, *and shall be jointly and severally liable to the creditors* and stockholders or members, to the extent of its property and effects that shall come into their hands." (Emphasis supplied.)

It is thus indisputable that the trustees were the first transferees of the assets of Signal Gasoline Corporation.

Section 416 of the Code of Civil Procedure of the State of California as it stood in 1928 and as it stands today, reads in part as follows:

> "In all cases where a corporation has forfeited its charter or right to do business in this state, *the persons who become the trustees of the corporation* and of its stockholders or members *may be sued in the corporate name of such corporation* in like manner as if no forfeiture had occurred and from the time of the service of the summons and a copy of the complaint in a court action, upon one of said trustees, or of the completion of the publication when service by publication is ordered, *the court is deemed to have acquired jurisdiction of all said trustees,* and to have control of all subsequent proceedings * * *" (Emphasis supplied.)

The jurisdiction which the court acquires is not jurisdiction of the dissolved corporation, however, but only of the trustees. (*Crossman v. Vivienda Water Company, supra,* and *7 Cal. Jur.* 176.)

Consequently, the deficiency letter issued on December 28, 1929, in the name of Signal Gasoline Corporation was really issued to the trustees of the dissolved corporation and the petition filed in the name of Signal Gasoline Corporation was really the petition of the trustees. The Board proceedings and assessment were therefore probably valid as to the trustees but not as to the corporation.

The Government had six years from October 1, 1932, to sue the trustees, but did not do so. The suit against

the appellant herein, the second transferee, was not brought within four years of the filing of the return and is barred by the statute of limitations, the assessment against the trustees (the first transferees) not giving the Government six years within which to sue subsequent transferees. *(U. S. v. Continental Bank and Trust Company, supra.)*

In *Buzzard v. Helvering,* 77 Fed. (2d) 391, the statutory trustees of a dissolved California corporation filed an appeal with the Board of Tax Appeals, as trustees, but the petition was filed in the name of the dissolved company. The Court, after citing Section 400 of the Civil Code of California and *Crossman v. Vivienda Water Company, supra,* at page 395, said:

> "* * * The appeal from the deficiency notice, we think, was an appeal by the trustees of the lumber company, however it may have been styled in the hearings or in the pleadings."

Again at page 395 the court said:

> "* * * and we think it also clear that the decision of the Board, sustaining the deficiency notice of the Commissioner, was no more or less than an ascertainment of the validity of the debt of the lumber company for which, under the tax statutes, petitioners, as trustees, were liable and bound to account under the tax laws and under the California statute."

Also on the same page the court said:

> "In this view we hold (1) * * *; (2) that the petition filed April 11, 1925, by the trustees for a redetermination of the deficiencies, however styled, was in legal effect an appeal by the trustees appointed to administer the affairs of the dissolved corporation; * * *"

Similarly in the case at bar the appeal filed by the statutory trustees of Signal Gasoline Corporation, though styled in the name of the corporation, was really an appeal by the trustees.

Since the appeal was filed by the trustees, the subsequent assessment was also against the trustees.

But as shown by the decision of the Supreme Court of the United States in *U. S. v. Continental Bank and Trust Company, supra,* an assessment made against the statutory trustees as first transferees does not give the Government six years within which to sue the second or later transferees, namely, the appellant herein.

It is apparent, therefore, that the deficiency letter issued by the Commissioner of Internal Revenue addressed to Signal Gasoline Corporation after that corporation has been dissolved and under California law utterly destroyed, was really addressed to the statutory trustees as transferees, and the petition they filed was in the capacity as trustees and transferees.

Under that view of the case, the proceeding before the Board and the assessment were valid as to the trustees, but since this was an assessment against the first transferees of the taxpayer corporation, Signal Gasoline Corporation, that assessment did not give the Government six years within which to sue the second transferee, namely, Signal Oil and Gas Company. *(U. S. v. Continental Bank and Trust Company, supra.)*

Summarizing as to Case No. 1461-Y, it seems clear from the law and the facts that if the purported proceeding before the Board and the purported assessment related to Signal Gasoline Corporation, they were entirely null

and void and there is no evidence that any additional tax is due, as that corporation had been dissolved long before the purported assessment was made. Consequently, the appellee cannot base a six year period to sue appellant upon such void assessment.

On the other hand, if the proceedings before the Board and the assessment related to the statutory trustees of Signal Gasoline Corporation, a dissolved corporation, then such assessment was probably valid and is evidence that the additional tax is owing but such assessment was against the first transferees of Signal Gasoline Corporation and this assessment does not give the Government six years within which to sue the subsequent transferee, namely, appellant.

Consequently, the complaint in Case No. 1461-Y is barred by the statute of limitations.

4. Statute of Limitations Provisions in Taxing Statutes Must Be Strictly Construed Against the Government.

In *United States v. Updike,* 281 U. S. 489, the Supreme Court of the United States, p. 496, said:

> "In any event, we think this is a fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, including provisions of limitations embodied therein, to be construed strictly in favor of the taxpayer. Bowers v. New York & Albany Company, 273 U. S. 346, 349, 47 Supr. Ct. 389, 71 Law Ed. 676."

In *Bowers v. New York & Albany Lighterage Company, supra,* the court, among other things, said at page 390:

> "The provision (limitation) is a part of the taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers. Eidman v. Martinez, 184 U. S. 578, 583, 22 S. Ct. 515, 46 Law. Ed. 697; Shwab v. Doyle, 258 U. S. 529, 536, 42 S. Ct. 391, 66 Law. Ed. 746, 26 A. L. R. 1454."

If there is any doubt about the statute of limitations point in this case, the doubt must be resolved in favor of the taxpayer and not in favor of the Government. There is nothing inequitable in pleading the statute of limitations; certainly nothing inequitable in pleading the statute of limitations when the appellee brings suit in 1938 on a presumed assessment made in 1932 for the 1923 and 1924 taxes of other corporations whose assets passed through the hands of three successive transferees before reaching the appellant.

As said by the Supreme Court in *United States v. Updike,* 281 U. S. 489, 495:

> "In such case, to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought."

5. **Appellant Is Not Estopped From Asserting the Bar of the Statute of Limitations, Appellee Having at All Times Been in Possession of All the Material Facts and Having Initially Made an Error of Law Which Error Misled the Appellant's Predecessors Into Further Errors of Law, if They Made Any Errors of Law, But Estoppel Does Not Arise From Errors or Mutual Errors of Law.**

In the conclusions of law approved by the District Court [Tr. p. 60] the following is included:

> "That the defendant is estopped from setting up the bar of the statute of limitations to the causes of action set forth in complaints No. 1460-Y and 1461-Y."

Apparently the acts relied upon by the appellee to establish the estoppel are as follows:

1. A series of corporations each having in its name the word "Signal" have been in existence and have dissolved, distributing their assets to their successors, the assets finally reaching the appellant. But appellee never had any difficulty in determining the separate tax liabilities of the several corporate entities.

2. On May 13, 1929, the corporation income tax return for 1928 was filed with the Collector of Internal Revenue at Los Angeles, California, on behalf of the Signal Gasoline Corporation and was signed by S. B. Mosher, as president, and O. W. March, as treasurer, of the said corporation. But the return stated that Signal Gasoline Corporation had been dissolved in December of 1928.

3. Petitions in the name of Signal Gasoline Corporation were filed with the Board of Tax Appeals on February 24, 1930, after Signal Gasoline Corporation had been

dissolved. But these petitions stated that Signal Gasoline Corporation had been dissolved and that the statutory trustees were acting.

4. A protest against a proposed deficiency for 1927 income tax of Signal Gasoline Corporation was signed about November 20, 1929. This protest was signed "Signal Gasoline Corporation, by S. B. Mosher". But at the left of said signature five other trustees of the dissolved corporation signed their names. The protest was verified by Melvin D. Wilson, one of the attorneys in fact and in law, which stated that he had verified it for the reason that when the statutory trustees signed the protest, they neglected to acknowledge it before a notary public.

5. On July 27, 1931, a letter signed "Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller", was mailed to the Collector at Los Angeles, California, stating that there was pending before the United States Board of Tax Appeals the question of whether Signal Gasoline Corporation was liable for the 1923 income tax liability of Signal Gasoline Company. But this letter, and the letters mentioned in the following three paragraphs, were not written until more than two years after the Commissioner had been informed of the dissolution of Signal Gasoline Corporation. Furthermore, J. H. Rounsavell was not the statutory trustee of the dissolved corporation; nor even one of them. Consequently, he had no standing or authority to represent the dissolved corporation, or the trustees.

6. On January 20, 1932, a letter to the Commissioner of Internal Revenue was written and signed "Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller", advising the Commissioner to change his records so that all

correspondence relative to the income tax matters of the Signal Gasoline Corporation for 1924 and 1928 inclusive would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California. [Tr. p. 81.]

7. On January 20, 1932, a letter to the Commissioner signed "Signal Gasoline Company, by J. H. Rounsavell, Comptroller", was mailed advising the Commissioner to change his records so that all correspondence pertaining to the income tax liability of Signal Gasoline Company for 1922 to 1924, inclusive, would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California.

8. On January 20, 1932, a letter to the Commissioner signed "Signal Gasoline Company, Inc., by J. H. Rounsavell, Comptroller", was mailed advising the Commissioner to change his records so that all correspondence pertaining to the income tax liability of Signal Gasoline Company, Inc. for 1925, 1926, 1927, and 1928, inclusive, would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California.

9. An offer to compromise the taxes here involved, acknowledged October 21, 1932, was filed shortly thereafter. It was signed "Signal Gasoline Corporation, by S. B. Mosher, H. M. Mosher, O. W. March, R. H. Green. C. Lav. Lazalere". In the body of the compromise and in the acknowledgment it was stated that the corporation had been dissolved and that the persons who signed the protest were the statutory trustees of the dissolved corporation.

10. A similar offer, acknowledged January 23, 1933, and filed shortly thereafter, stated that Signal Gasoline Corporation was dissolved December 12, 1928. It was

signed "Signal Gasoline Corporation, by Melvin D. Wilson, Attorney in Fact". The acknowledgment as well as the offer itself stated that Signal Gasoline Corporation was a dissolved corporation.

11. That at all times herein mentioned and considered, substantially the same persons were officers and directors or statutory trustees of the Signal Gasoline Corporation, as were the officers and directors of the Signal Oil and Gas Company and officers and directors or trustees of Signal Gasoline Company. [Tr. p. 57, par. 22.]

12. That in addition to the acts heretofore described, the statutory trustees of the Signal Gasoline Corporation after its dissolution, who were those persons who were the officers and directors of the defendant, persisted in transacting business affairs of the dissolved corporation in the name of the Signal Gasoline Corporation, and in particular the negotiations with the United States of America regarding the tax liabilities of the Signal Gasoline Corporation. [Tr. p. 58, par. 25.]

13. The attorneys who represented the former corporations before the Board and before the Bureau of Internal Revenue are now representing the appellant in the case at bar.

The appellee argued for estoppel in the court below and induced the court to include the doctrine of estoppel in the court's conclusions of law.

It is difficult to understand the District Court's minute order in Case No. 1460-Y [Tr. pp. 45-46] unless it is assumed that the court relied on the doctrine of estoppel. The court said that the assessment against Signal Gasoline Corporation was valid. It then said that the case

was not the case of a suit against the transferee of a transferee and hence the taxpayer could not invoke the doctrine of *United States v. Continental National Bank and Trust Company.*

It was perfectly clear before the District Court as it is here that Signal Gasoline Corporation was the transferee of the assets of the Signal Gasoline Company and that appellant is the tranferee of the assets of the Signal Gasoline Corporation. Since the tax involved in Case No. 1460-Y relates to the 1923 and 1924 taxes of Signal Gasoline Company, it is too clear for argument that the case involved here is a suit against the transferee of a transferee.

If we assume that the District Court understood the facts, then we must assume that the District Court in effect held that this entire chain of corporations constituted one corporation by the doctrine of estoppel, and that the assessment against the Signal Gasoline Corporation for the tax of the Signal Gasoline Company was in effect an assessment against the appellant.

In Case No. 1461-Y, the District Court apparently did not rely on the doctrine of estoppel, but simply relied on the case of *McPherson v. Commissioner,* 54 Fed. (2d) 751, to the effect that the assessment against Signal Gasoline Corporation was valid as against that corporation and was not an assessment against the statutory trustees.

In other words, in Case No. 1460-Y the court seems to have relied on the doctrine of estoppel, whereas in the Case No. 1461-Y it did not rely on that doctrine but apparently relied on the case of *McPherson v. Commissioner, supra.*

(a) The Estoppel Point.

The elements of estoppel are too well known to this court to require extensive citation of authority. In *Van Antwerp v. U. S.,* 92 Fed. (2d) 871, statements relative to estoppel were made at page 875 as follows:

> "The burden of proving every essential element of an estoppel is upon the parties seeking to set up an estoppel. Hanneman v. Richter, 177 Fed. (2d) 563, 566; Merrill v. Tobin, 30 Fed. 738, 743; Mackey Wall Plaster Company v. U. S. Gypsum Company, 244 Fed. 275, 277; Hull v. Commissioner, 87 Fed. (2d) 260, 262; Commissioner v. Union Pacific Railroad Company, 86 Fed. (2d) 637, 640.
>
> "These essential elements of estoppel, each of which the Government must prove in this case, are set up in an authority cited in the Government's brief;
>
> "To constitute estoppel (1) there must be false representation or wrongful misleading silence. (2) The error must originate in a statement of fact and not in an opinion or a statement of law. (3) The person claiming the benefits of estoppel must be ignorant of the true facts, and (4) be adversely affected by the acts or statements of the person against whom an estoppel is claimed.
>
> "U. S. v. Scott & Son, C. C. A. 1, 69 Fed. (2d) 728, 732."

See, also, to the same effect, *Helvering v. Brooklyn City Railroad Company,* 72 Fed. (2d) 274; *Tidewater Oil Company,* 29 B. T. A. 1208; *Merten's Law of Federal Income Taxation,* 1939, Cum. Suppl. 2511-12-13.

The evidence shows very clearly that the Commissioner of Internal Revenue treated all the corporations involved

as separate corporations, computed their income and their tax liabilities separately, issued separate deficiency letters, and throughout clearly recognized the separate corporate entities.

The evidence shows that the Commissioner was notified of the dissolution of Signal Gasoline Corporation as follows :

On May 13, 1929 [R. 82, par. aa];

November 20, 1929 [R. 79-80-95-6-7; Plaintiff's Ex. 7];

February 24, 1930 [R. 75].

The Commissioner indicated that he knew of the dissolution in 1928, of Signal Gasoline Corporation as early as August 16, 1930, and March 30, 1931, as his communications so stated. [R. 82-3.]

Thus the Commissioner knew within six months after the dissolution of Signal Gasoline Corporation that it had been dissolved. The Commissioner knew this for approximately twenty months before the Board of Tax Appeals purported to render its decision against Signal Gasoline Corporation.

Consequently there was no misrepresentation or concealment of material facts by Signal Gasoline Corporation to the Commissioner of Internal Revenue. The facts were as well known to the Commissioner as they were to the trustees of the former corporation. There was no intention on the part of the trustees of the dissolved Signal Gasoline Corporation that the Commissioner, the Board of Tax Appeals, or anyone else should treat Signal Gasoline Corporation as though it were still in existence. The

trustees notified everyone with whom they came in contact that Signal Gasoline Corporation had been dissolved.

The Commissioner did not rely upon the supposed continued existence of Signal Gasoline Corporation. The Commissioner knew long before he proceeded against Signal Gasoline Corporation for the 1923-1924 taxes that the latter had been dissolved. He knew in May of 1929 that the Signal Gasoline Corporation had been dissolved whereas he did not proceed against it for the 1924 taxes until December of 1929.

When, in the petition filed February 24, 1930, the Commissioner was again notified that Signal Gasoline Corporation had been dissolved, he had until December 31st, 1930, to assess the trustees or the appellant herein. (Sec. 280 (b) (1) Revenue Act of 1926.) That he did not do so was due to no fault of the trustees or the appellant.

As a matter of fact, the Commissioner simply made a mistake of law as to the effect of Section 400 of the Civil Code of California. The Commissioner was presumed to know the law of California and therefore was presumed to know that Signal Gasoline Corporation had been completely destroyed upon its dissolution in December of 1928. In fact, the Commissioner had knowledge that under California laws a corporation was completely destroyed by its dissolution. See *Sanborn Bros. Successors,* 14 B. T. A. 1059, decided Jan. 8, 1929. In that case the headnote of the Board's decision reads as follows:

> "A corporation of California had forfeited its charter in 1917 under the California statute of 1915, and under California law its affairs thereafter were in the hands of the former directors as trustees. Respondent determined deficiencies against the corpora-

tion for 1919 and the former stockholders, by one of their number, filed a petition with the Board. Held, since the stockholders are not the persons against whom the deficiency has been determined and has no authority to represent such persons, the Board has no jurisdiction."

Inasmuch as the Commissioner at the time he issued his deficiency notice on December 28, 1929, had been informed that Signal Gasoline Corporation had been dissolved, the Commissioner's action in addressing the dissolved corporation as Signal Gasoline Corporation really led the trustees of Signal Gasoline Corporation to file an appeal with the United States Board of Tax Appeals in the name of Signal Gasoline Corporation. The petition stated, however, that the corporation had been dissolved and the dissolved corporation was acting through its statutory trustees.

If the petition was not properly entitled in order to constitute a pleading by the trustees as such, the error was one of law and was induced by the manner in which the Commissioner addressed the deficiency letter.

It is well established that estoppel cannot exist as to a mistake or mutual mistake of law, or as to an expression of opinion, as distinguished from a representation of facts. (*Helvering v. Salvage,* 297 U. S. 106; *Van Antwerp v. U. S.,* 92 Fed. (2d) 871; *Hawke v. Commissioner,* 109 Fed. (2d) 946; *Tidewater Oil Co.,* 29 B. T. A. 1208; *S. F. Scott & Son v. Commissioner,* 69 Fed. (2d) 728; *Union Pacific R. R. Co.,* 32 B. T. A. 383, affirmed in *Commissioner v. Union Pacific R. R. Co.,* 86 Fed. (2d) 637; *U. S. v. Dickinson,* 95 Fed. (2d) 65; *Grand Central Public Market, Inc. v. U. S.,* 22 Fed. Supp. 119, appeal dismissed 98 Fed. (2d) 1023, C. C. A. 9.)

The Commissioner had a large number of skilled employees, attorneys and others engaged in collecting taxes in California, and certainly had as much opportunity to know the law of California as did the trustees of the dissolved corporation. The Commissioner deals with hundreds of cases of corporations and dissolved corporations, whereas the trustees had only the one case. When the Commissioner wrote to the dissolved corporation in the name of the former corporation, he led the trustees and their counsel into thinking that that was the proper manner in which the trustees of a dissolved corporation would handle its tax matters.

It is very doubtful if any mistake of law has been made by appellant's predecessors or their trustees.

As a matter of law, the deficiency letters issued in the name of Signal Gasoline Corporation, after it had been dissolved, was probably a letter issued to the trustees, and the petition filed by the trustees in the name of the dissolved corporation was a petition by and for the trustees. (See the discussion on this point, pp. 26 to 31, incl.)

But an assessment against the trustees (first transferees) would not give the Government six years to sue the appellant, who was a subsequent transferee (second transferee). *(U. S. v. Continental National Bank & Trust Co., supra.)* Probably the only mistake which has been made, was the appellee's erroneous opinion that a valid assessment against the first transferee would give it six years to sue the second transferee.

Furthermore, the acts upon which appellee would base its estoppel are not the acts of the appellant, but of corporations whose existence has long since been terminated by law, or the trustees thereof.

Appellant should not be estopped from pleading the statute of limitations.

(b) The McPherson Case.

In its minute order in Case No. 1461-Y, the court below relied on the case of *McPherson v. Commissioner*, 54 Fed. (2d) 751, as its authority for the proposition that the purported assessments against Signal Gasoline Corporation were valid, even though that corporation had long before been dissolved.

The *McPherson* case was decided by this court, and related to a dissolved California corporation. The lower court apparently felt bound by that decision, even though, in *G. M. Standifer Construction Corporation v. Commissioner*, 78 Fed. (2d) 285, this court more thoroughly considered the law as to the effect of the dissolution of a corporation, when no provision is made for continuing the corporate existence. In the latter case, this court held that a dissolution under laws similar to California's applicable law completely destroys the corporation and no subsequent proceedings affecting it are valid.

It is very apparent that, in the *McPherson* case, there was not called to the attention of the court the California cases holding that corporations dissolved before July 14, 1929, were absolutely destroyed, whereas corporations dissolved thereafter continue to exist for the purpose of winding up their affairs.

Furthermore, in the *McPherson* case, the statutory trustees signed a waiver of the statute of limitations, designating themselves as surviving trustees of Leighton's, Inc., a dissolved corporation taxpayer. It will be noted that the waiver was by the trustees and not by the cor-

poration and that the trustees did not appeal a later deficiency notice and consequently an assessment was made in the name of the corporation, but apparently against the statutory trustees, as a matter of law. Within the statutory time thereafter, the Commissioner proceeded against the trustees individually, as transferees of the assets of the former corporation.

The court, in the *McPherson* case, said that whether the former corporation was designated by its name or under the term "a dissolved corporation", or as "a dissolved corporation in the hands of trustees", served to suggest a matter of form only and not one attended by substantial differences. That was possibly true in the *McPherson* case since the statutory trustees had given a waiver as trustees, and it is reasonable to suppose that the further proceedings by the Commissioner were against the statutory trustees.

In Case No. 1461-Y, however, it makes a difference whether the alleged assessment was against Signal Gasoline Corporation, or against the statutory trustees. If against the corporation, and if, contrary to appellant's contentions, it were held valid, it would possibly give appellee six years within which to sue first or even second transferees of the assets.

On the other hand, if the assessment was against the statutory trustees, it would be valid. But since the statutory trustees were the first transferees of the assets of Signal Gasoline Corporation, a valid assessment against

them would not give the appellee six years in which to sue the second transferee, namely, appellant. *(U. S. v. Continental National Bank & Trust Co., supra.)*

It should be noted that the decision of this court in *McPherson v. Commissioner,* supra, is not based upon the grounds of estoppel; consequently, it must be considered that the decision was overruled by this court in its later decision in the case of *G. M. Standifer Construction Company v. Commissioner,* 78 Fed. (2d) 285; or if not so overruled, then it is submitted that the *McPherson* case is not, since the decision of the Supreme Court in *U. S. v. Continental National Bank & Trust Co., supra,* good law, since to ignore the difference between making a void assessment against a dissolved corporation or a valid assessment against its statutory trustees, does not give the principle announced in the *U. S. v. Continental* case a chance to operate.

In any event, in the *McPherson* case, the suit before this court (and probably the assessment itself) was against the first transferees, namely, the statutory trustees, whereas in the cases at bar, the suits are against the second transferees. Since the *McPherson* case was decided, the Supreme Court has held that an assessment against the first transferees does not give the Government six years in which to sue second transferees.

Consequently, the *McPherson* case does not establish the solidity of the assessment against Signal Gasoline Corporation.

Summary.

It is respectfully submitted that the suits herein are barred by the statute of limitations because brought more than four years after the taxpayer corporations filed their 1923 and 1924 income tax returns; because the Commissioner of Internal Revenue never assessed the alleged tax against the appellant herein; because the alleged assessments against Signal Gasoline Corporation were invalid and hence there is no evidence that any tax is owing from anyone, and do not create a basis for a six year period for suit; and even if there had been a valid assessment against that corporation or its trustees, this would not have given the appellee six years within which to sue appellant, second transferee of the assets of the taxpayer corporation; that the Supreme Court decision in *U. S. v. Continental National Bank & Trust Co., supra,* is squarely in point; that neither appellant nor any of the predecessor companies nor trustees of dissolved corporations have concealed from, or misrepresented any facts to, the Commissioner of Internal Revenue; and if any mistake was made, it was originated by the Commissioner, who made a mistake of law, and if any of the taxpayers made a mistake, it was a mistake of law induced by the mistake of the Commissioner, but no estoppel is based upon innocent or mutual mistakes of law.

The judgments against appellant should be reversed.

Respectfully submitted,

MELVIN D. WILSON,
Attorney for Appellant.

APPENDIX.

Statutes Involved.

Section 277(a)(1) of the Revenue Act of 1924 provides as follows:

"The amount of income, excess profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921, and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

Section 278(d) of the Revenue Act of 1926 reads as follows:

"Where the assessment of any income, excess-profits, or war-profits tax imposed by this Title or by prior Acts of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint, or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Section 400 of the Civil Code of California, in effect until August 14, 1929, provided as follows:

"Sec. 400. DIRECTORS, TRUSTEES OF CREDITORS, ON DISSOLUTION. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the

creditors and stockholders or members of the corporation dissolved, and have full powers to settle the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation, and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands. Death, resignation or failure or inability to act shall constitute a vacancy in the position of trustee, which vacancy shall be filled by appointment by the Superior Court upon petition of any person or creditor interested in the property of such corporation. Such trustees may be sued in any court in this state by any person having a claim against such corporation or its property. Trustees of corporations heretofore dissolved or whose charters have heretofore been forfeited by law shall have and discharge in the same manner and under the same obligations, all the powers and duties herein prescribed. Vacancies in the office of trustees of such corporation shall be filled as hereinbefore provided; provided, however, that any deed executed in the name of such corporation by the president or vice-president and secretary or assistant secretary after a dissolution thereof or after a forfeiture of the charter of such corporation or after the suspension of the corporate rights, privileges and powers of such corporation, which deed shall have been duly recorded in the proper book of records of the county in which the land or any portion thereof so conveyed is situated, for a period of five years, shall have the same force and effect as if executed and delivered prior to said dissolution, forfeiture or suspension."